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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

RICHARD ROE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

1. Despite its acknowledgement in the court of appeals that the case was moot and that prior decisions should be vacated, App. 25a, the United States now does an about-face in this Court and argues that the case was *not* moot when decided by the court of appeals, even though the grand jury had already expired, and that decisions to the contrary by the Fifth, Eighth, and Ninth Circuits are distinguishable. The government was right in the court of appeals; it is wrong here.

2. ***First***, the Brief in Opposition ("Opp.") makes absolutely clear that there is no "reasonable expectation" that Roe will be subpoenaed by a new grand jury. The

government admits that the investigation pursuant to which Roe was subpoenaed is no longer being "actively pursued" and will not be unless some unspecified "developments" occur in a different case at some unspecified point in the future. Opp. at 4 n.3. The government does not even claim that *if* the "developments" occur and the investigation is reactivated, a subpoena will issue to Roe. The best the government can do is the lame assertion that it has not "abandoned the possibility of pursuing the investigation that led to the issuance of the subpoenas before a new grand jury." Opp. at 11. On this record, there is nothing approaching a "reasonable expectation" that the subpoena dispute will recur between Roe and the United States. *See Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam) ("The Court has never held that a mere physical or theoretical possibility was sufficient to satisfy the test stated in *Weinstein*.").[1]

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[1] *Honig* v. *Doe*, 484 U.S. 305 (1988), does not support the government's position. The *Honig* Court found a "reasonable expectation" that an emotionally disturbed student would again be subject to a state policy of excluding disruptive emotionally disturbed students from the classroom. The Court based its finding of a "reasonable expectation" on the student's "continued eligibility for educational services under the [Education of the Handicapped Act], the nature of his disability, and [the state's] insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct." *Id.* at 318-19. The Court concluded that "[i]n the absence of any suggestion that [the student] has overcome his earlier difficulties, it is certainly reasonable to expect, based on his prior history of behavioral problems, that he will again engage in classroom misconduct." *Id.* at 320.

SEC v. *Sloan*, 436 U.S. 103 (1978), also relied upon by the government, is similarly distinguishable. In *Sloan*, the Court found that an action for review of an SEC order suspending the trading of a corporation's stock was not moot. The Court found a "reasonable expectation" that the corporation would be subject to similar orders in the future because the corporation "has, to put it mildly, a history of sailing close to the wind," including two prior trading suspensions in the preceding five years. *Id.* at 109 & n.5.

In both *Honig* and *Sloan*, there was an ample basis in the record from which to find a "reasonable expectation" that the dispute

3. The government's attempt to distinguish *In re Grand Jury Proceedings (Larson)*, 785 F.2d 629 (8th Cir. 1986), falls flat. The government notes that in *Larson* there was no "reasonable expectation" that the witnesses would be called before a new grand jury because (1) the previous grand jury had returned an indictment against Larson, the target of the investigation, (2) the grand jury had been released, and (3) the government made no response to the court of appeals' mootness inquiry. Opp. at 11. If anything, the circumstances here militate even more strongly in favor of a finding of mootness: (1) the expired grand jury returned an indictment against targets of the investigation, (2) the grand jury has been released, and (3) rather than remain silent as in *Larson*, the government actually conceded in the court of appeals that the case was moot.[2]

4. *Second*, the government offers no basis to conclude that grand jury contempt citations are "in [their] duration too short to be fully litigated prior to [their] cessation or expiration." *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). Although the government concedes that appeals from grand jury contempt citations must be expedited under 28 U.S.C. 1657(a), it misleadingly cites median resolution periods for *non-expedited*

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would recur between the parties. Here, by contrast, there is absolutely no such basis; before the court of appeals the government conceded that the case was moot, and even in this Court the government can say only that it "ha[s] not abandoned the possibility of pursuing the investigation that led to the issuance of the subpoenas before a new grand jury." Opp. at 11.

[2] The government relies upon *United States* v. *Universal Mfg. Co.*, 525 F.2d 808 (8th Cir. 1975), in which the Eighth Circuit found that a dispute over a grand jury subpoena was not rendered moot by the expiration of the grand jury. Opp. at 11-12 n.10. In that case, however, the court rested its decision on its "understanding" that a "new grand jury is continuing the investigation conducted by its predecessor." *Id.* at 811 n.2. There is absolutely no record basis for any such "understanding" here.

civil appeals to suggest that grand jury contempt appeals often could not be resolved during the grand jury's standard eighteen-month term. Opp. at 7 n.7. Criminal appeals—which, like appeals from contempt citations, must be expedited—present a more apt analogy. The median duration of a criminal appeal ranges from 6.0 months in the Second Circuit to 13.8 months in the Ninth Circuit. *Annual Report of the Director of the Administrative Office of the United States Courts* 156 (1988). Appeals in cases involving prisoner petitions, which also must be expedited, range in median duration from 5.6 months in the Fourth Circuit to 14.9 months in the Ninth Circuit. *Id.* at 155. The median for *every* circuit in both types of case is well below the eighteen-month life span of the grand jury. Indeed, *this* case demonstrates that contempt citations involving non-incarcerated witnesses generally can be reviewed during the life of the grand jury; Roe's appeal was decided less than three months after it was filed, and just eight months after the subpoenas were issued.[3]

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[3] The government advances the novel argument that the proper inquiry under the "evading review" prong is not whether the challenged action would evade review if it happened again, but whether it in fact evaded review in the prior litigation. Opp. at 4-7. The government's argument is wrong both as a matter of law and as a matter of logic. First, prior decisions of this Court make clear that the issue is whether the challenged action would evade review *if it occurred again*. *See, e.g., First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 774 (1978) ("capable of repetition" exception applies because duration of challenged action "proved too short a period of time for appellants to obtain complete judicial review, and there is every reason to believe that *any future suit would take at least as long*") (emphasis added). Second, if the inquiry were whether the action had evaded review in the *prior* litigation, as the government claims, then the "evading review" prong would virtually always be satisfied, since the mootness issue only arises when the challenged action has expired or terminated before review can be completed.

California Coastal Comm'n v. *Granite Rock Co.*, 480 U.S. 572 (1987)—the only case cited by the government to support this argument—in fact undermines its position. Contrary to the govern-

5. In its efforts to distinguish *In re Grand Jury Proceedings*, 863 F.2d 667 (9th Cir. 1988), the government misstates the basis for the Ninth Circuit's holding that grand jury contempt appeals are not of such "inherently short duration" as to preclude review. *Id.* at 669. The government argues that even though the witness in *In re Grand Jury Proceedings* was released pending appeal, the Ninth Circuit nevertheless found the 30-day rule in 28 U.S.C. § 1826(b) applicable and rested its decision on that ground. Opp. at 8-9.[4] But the Ninth Circuit's refusal to invoke the "capable of repetition, yet evading review" exception was not based on application of the 30-day rule to the witness *in that case*, but on the court's conclusion that § 1826(b) provided a means by which any future appeal, and contempt appeals generally, could be resolved expeditiously. *See* 863 F.2d at 669-70. Contrary to the government's suggestion, the opposite results reached by the Ninth Circuit and the court below stem not from "potentially divergent" interpretations of § 1826(b), Opp. at 9, but from fundamentally different understandings of the application of the mootness doctrine and the scope of the "capable of repetition, yet evading review" exception.[5]

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ment's assertion, Opp. at 6 n.5, the Court in *California Coastal* did not "reject[] the contention" that the party seeking review had to demonstrate that "the case would probably again evade review if a new suit were filed . . . ." Rather, the Court's holding that the case was not moot appears to rest on its view that the case *would* evade review again if a new suit were filed. *See* 480 U.S. at 578. Justice Scalia's dissent takes issue with the majority's apparent conclusion, but (contrary to the government's suggestion, Opp. at 6-7 n.5) in no way implies that the majority based its decision on the fact that the contested action had evaded review in the prior litigation. *See* 480 U.S. at 607 n.1 (Scalia, J., dissenting).

[4] The government concedes that the position it ascribes to the Ninth Circuit on the scope of 28 U.S.C. § 1826(b) is at odds with every circuit but one that has addressed the issue. Opp. at 5 n.4.

[5] The government argues that the court of appeals did not violate the rule of *United States* v. *Munsingwear, Inc.*, 340 U.S. 36 (1950),

6. *Third*, the government offers a series of purported policy grounds for holding the "capable of repetition" exception applicable here. Opp. at 13. None of these grounds seems even remotely plausible; it is far-fetched, for example, to suppose that holding this case moot will cause potential witnesses to resist enforcement of subpoenas, or provoke district courts to hold contemnors in jail pending appeal to ensure that contempt orders are not vacated for mootness.

7. Even if the government's policy arguments had more strength than they do, they would not permit the federal courts to exceed the limited power accorded them under Article III to adjudicate "live case[s] or controvers[ies]." *Burke* v. *Barnes*, 479 U.S. 361, 363 (1987). For almost two centuries, since this Court under Chief Justice Jay refused to furnish an advisory opinion to President Washington on a profound question of foreign policy,[6] it has been a basic tenet of our constitutional system that the federal courts cannot issue advisory opinions in the absence of concrete "cases" or "controversies" merely because the judges find the issues interesting or the policies to be served worthwhile. The court of appeals' failure to follow that fundamental principle warrants summary reversal and a direction to vacate all opinions and orders below. *See, e.g., Great Western Sugar Co.* v. *Nelson*, 442 U.S. 92 (1979) (per curiam).

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because it properly found that the case was not moot. Opp. at 12. For the reasons set forth above, the government is wrong on the mootness issue, and it is therefore wrong as well in its analysis of the application of *Munsingwear* to this case.

[6] *Correspondence of the Justices* (Aug. 8, 1793), *reprinted in* HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 66-67 (3d ed. 1988).

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, Petitioner respectfully submits that the petition for a writ of certiorari should be granted, the judgment of contempt summarily reversed, and the case remanded to the court of appeals with instructions to order all opinions and judgments in this matter vacated as moot.

Respectfully submitted,

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